

1 Elizabeth J. Cabraser (State Bar No. 083151)
ecabraser@lchb.com
2 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
3 San Francisco, CA 94111-3339
Telephone: 415.956.1000
4 Facsimile: 415.956.1008

Lead Counsel for Plaintiffs

6

7

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 IN RE: McKINSEY & CO., INC.
12 NATIONAL PRESCRIPTION OPIATE
CONSULTANT LITIGATION

13 This Document Relates to:

14 ALL CASES

Case No. 21-md-02996-CRB (SK)

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION TO LIFT THE
DISCOVERY STAY;
MEMORANDUM OF POINTS AND
AUTHORITIES IN
SUPPORT**

Date: July 15, 2022

Time: 9:00 a.m.

Courtroom: Courtroom 6, 17th Floor

Judge: The Honorable Charles R. Breyer

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs move the Court for an order lifting the stay on discovery as set forth in Pretrial Order No. 1, ECF No. 56 (“PTO 1”). This motion is based upon this Notice of Motion; the accompanying Memorandum of Points and Authorities; the accompanying Declaration of Kelly K. McNabb; the argument of counsel, if requested; and such other matters as the Court may consider.

STATEMENT OF ISSUE TO BE DECIDED

Whether McKinsey can meet its heavy burden of demonstrating that the discovery stay issued in Pretrial Order No. 1 should continue.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs respectfully move the Court to lift the stay on discovery as set forth in Pretrial Order No. 1. While the parties have engaged in some informal discovery since this litigation was transferred to this Court on June 7, 2021, limited to the reproduction of documents from other cases, Plaintiffs’ efforts to advance their cases have stalled due to the discovery stay. Plaintiffs thus seek an order lifting the stay.

I. Background

The Court is familiar with the underlying allegations, which concern McKinsey’s engineering of the aggressive marketing strategies that caused the opioid epidemic. In its initial pretrial order, the Court stayed “outstanding discovery proceedings” and provided that “no further discovery shall be initiated.” PTO 1, ¶¶ 1, 7. Since then, the Court and the parties have contemplated the initiation of discovery. *See, e.g.*, July 29, 2021 Hrg. Tr. 26:5-8 (recognizing the need to “figure out an appropriate discovery plan” for cases unaffected by McKinsey’s initial motions to dismiss’); Pretrial Order No. 2, ECF No. 211 (directing the parties to meet and confer regarding discovery produced in connection with MDL 2804 and State Attorneys General

1 settlements). Indeed, McKinsey has reproduced all documents it produced in MDL 2804 and in
 2 connection with its settlements with the State Attorneys General.¹

3 On January 26, 2022, Plaintiffs propounded a Second Set of Requests for the Production
 4 of Documents. Those requests seek documents related to investigations of opioid-related work
 5 McKinsey performed; communications between McKinsey and government agencies, such as the
 6 Food and Drug Administration (“FDA”); documents related to the work it performed for
 7 defendants in MDL 2804, for related trade groups, and for the FDA; documents related to its
 8 internal corporate organization; and documents related to personal jurisdiction, among others. *See*
 9 *generally* McNabb Decl., Ex. B, Plaintiffs’ Second Set of Requests for the Production of
 10 Documents. McKinsey, however, refused to engage in formal discovery absent further order from
 11 this Court, citing PTO 1. McNabb Decl., Ex. C, Email J. Cohen to K. McNabb re: discovery
 12 efforts and PTO 1 (May 5, 2022).

13 **II. The Court Should Lift the Stay on Discovery.**

14 Plaintiffs seek to lift the discovery stay. A district court has discretion to impose a stay of
 15 discovery upon a showing of “good cause.” *In re Nexus 6P Prods. Liab. Litig.*, No. 17-CV-
 16 02185-BLF, 2018 WL 3036734, at *1 (N.D. Cal. June 19, 2018). When considering a motion to
 17 lift a stay of discovery, courts apply the same standard as they would to a motion to stay
 18 discovery: the party seeking to continue the stay “carries the heavy burden of making a ‘strong
 19 showing’ why discovery should be denied.” *Id.* (quoting *Gray v. First Winthrop Corp.*, 133
 20 F.R.D. 39, 40 (N.D. Cal. 1990) (Vukasin, J.)).

21 McKinsey cannot meet its “heavy burden” of demonstrating that there is good cause to
 22 continue to stay discovery. Although McKinsey filed initial motions to dismiss, doing so does not
 23 warrant an “automatic or blanket stay of discovery.” *See, e.g., id.* (quoting *Tradebay, LLC v.*
 24 *eBay, Inc.*, 278 F.R.D. 597, 600 (D. Nev. 2011)). The motions to dismiss, moreover, do not seek
 25 to dismiss *all* claims thus, regardless of whether the Court grants McKinsey’s motions, this
 26 litigation will proceed. *See id.* at *2-3 (lifting stay on discovery with motions to dismiss pending

27
 28 ¹ *See also* Decl. of Kelly McNabb (“McNabb Decl.”), Ex. A, Plaintiffs’ First Request for the
 Production of Documents (requesting documents related to the Attorneys General cases).

1 where (as here) the motions would not be dispositive of the entire case). Allowing discovery to
 2 proceed will promote efficiency and Rule 1's mandate to "secure the just, speedy, and
 3 inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

4 Furthermore, this is an MDL. The core statutory purpose of an MDL is to conduct and
 5 complete the discovery relevant to the claims that comprise it with a maximum of dispatch,
 6 efficiency, and economy—and a minimum of repetition and delay. *See* 28 U.S.C. § 1407 (calling
 7 for "coordinated or consolidated pretrial proceedings" to "promote the just and efficient conduct"
 8 of "such actions"). Lifting the discovery stay will help achieve this purpose.

9 Plaintiffs seek discovery that is plainly relevant to the allegations in their complaints.
 10 Plaintiffs' case is broader than those brought by the Attorneys General and they are thus entitled
 11 to additional discovery beyond what McKinsey has already produced.² For example, as Plaintiffs
 12 have alleged, McKinsey shaped FDA drug approval processes and sought to influence its opioid-
 13 related policies. Thus, the documents Plaintiffs seek related to McKinsey's communications with
 14 government agencies regarding opioids, *see, e.g.*, RFP No. 4 ("All Documents, submissions, or
 15 Communications with any government entity or agency, including Congress, SAMHSA, DEA, or
 16 the FDA, related to Opioids."), are relevant—and indeed important—to Plaintiffs' case.

17 **III. Recent Events Support the Lifting of the Discovery Stay**

18 A recent report by the U.S. House of Representatives Committee on Oversight and
 19 Reform (the "Report") elaborates on allegations in Plaintiffs' master complaints regarding work
 20 performed by McKinsey for the FDA related to regulatory systems impacting opioids, concurrent
 21 to McKinsey working with its pharmaceutical manufacturer clients to navigate and influence
 22 these same systems. *See generally* House Comm. on Oversight and Reform, Interim Majority
 23 Staff Rep., *The Firm and the FDA: McKinsey & Company's Conflicts of Interest at the Heart of*
 24 *the Opioid Epidemic* (Apr. 13, 2022), available at <https://tinyurl.com/McKinseyHouseReport> and
 25 attached as McNabb Decl., Ex. D; *see also* ECF No. 296, Master Compl. (Subdivision) ¶¶ 396-
 26

27 ² *See Vident v. Dentsply Int'l, Inc.*, No. SACV061141PSGANX, 2008 WL 11343533, at *1-2
 28 (C.D. Cal. July 8, 2008), *aff'd*, 2008 WL 4384124 (C.D. Cal. Aug. 29, 2008) (ordering defendant
 to respond to discovery where it sought "only [to] produce responsive documents that it has
 already collected and produced in" an earlier case brought by the federal government).

1 420 (outlining McKinsey's work for the FDA). At a hearing before the Committee on April 27,
 2 2022 and in a press release, McKinsey sought to sidestep the concerns the Report raised with
 3 regard to its conflicts of interest, claiming that it did not advise the Agency "on regulatory
 4 decisions or on specific pharmaceutical products." McKinsey & Company, *Statement on Report*
 5 *by the US House Committee on Oversight and Reform* (Apr. 13, 2022), available at
 6 <https://www.mckinsey.com/about-us/media/statement-on-report-by-the-us-house-committee-on-oversight-and-reform>. But as Representative Katie Porter noted during the hearing, the FDA hired
 7 McKinsey for expert advice on "building the bones of a drug safety system," which affects how
 8 relevant "regulations actually get enforced." *McKinsey & Company's Conduct and Conflicts at*
 9 *the Heart of the Opioid Epidemic: Hearing before the Comm. on Oversight and Reform* (Apr. 27,
 10 2022), available at <https://www.youtube.com/watch?v=fK0pmrmjmtE>.

12 While the Report corroborates Plaintiffs' allegations that McKinsey played a key role in
 13 the Opioid Marketing Enterprise, including through misdirection of regulators, and arguments
 14 Plaintiffs have made in opposition to McKinsey's personal jurisdiction motion to dismiss,³ what
 15 is relevant for the purposes of the instant motion is that it discloses documents McKinsey has not
 16 yet produced and which Plaintiffs have sought in the Second Set of Requests. *E.g., compare*
 17 McNabb Decl., Ex. E (McKinsey's FDA engagement list cited in the Report) *with* Ex. B at 5
 18 (RFP Nos. 4-5 requesting agreements with the FDA).

19 CONCLUSION

20 For the foregoing reasons, Plaintiffs seek an order lifting the stay on discovery.

21

22 ³ For example, the Report further details the ways in which McKinsey was fully embedded in
 23 Purdue's operation. Report at 9 (referring to McKinsey's "mini 'army'" at Purdue) and 32
 24 ("McKinsey consultants at Purdue appear to have influenced Purdue's CEO transitions."); *see*
 25 ECF No. 347, Pls.' Opp. to McKinsey's Mot. to Dismiss for Lack of Personal Jurisdiction ("MTD
 26 Opp.") at 3 (describing McKinsey's "transformational relationship" with Purdue). It also
 27 demonstrates that McKinsey's engagement database does not give a complete picture of which
 28 consultants worked on a given project. Report at 10 (describing how one McKinsey consultant,
 despite not being "formally identified as a consultant to Purdue . . . appears to have served as an
 informal advisor . . . on Purdue matters"); *see also* MTD Opp. at 7 (noting the limits of the
 Scheidler declaration and that McKinsey's engagement database does not indicate where work
 was actually performed or directed). Lastly, the Report confirms that McKinsey performed
 opioid-related work in at least one of the Subject States. Report at 40 (potential opioid-related
 engagement for Virginia state government); *see also* Mar. 31, 2022 Hrg. Tr. 55:19-56:2 (outlining
 efforts McKinsey took to target Virginia).

1 Dated: May10, 2022

Respectfully submitted,

2 /s/ Elizabeth J. Cabraser

3 Elizabeth J. Cabraser

4 ecabraser@lchb.com

5 **LIEFF CABRASER HEIMANN &**
BERNSTEIN, LLP

6 275 Battery Street, 29th Floor

7 San Francisco, CA 94111-3339

8 Telephone: (415) 956-1000

9 Facsimile: (415) 956-1008

10 *Plaintiffs' Lead Counsel*

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that on May 10, 2022, I electronically filed the foregoing with the Clerk of
13 the Court by using the CM/ECF system. Copies will be served upon counsel of record by, and
14 may be obtained through, the Court CM/ECF Systems.

15 /s/ Elizabeth J. Cabraser

16 Elizabeth J. Cabraser

17
18
19
20
21
22
23
24
25
26
27
28